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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

WUILLIAM CAZARES CAMPOS,

Defendant and Appellant.

G056165

(Super. Ct. No. 14NF0312)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Affirmed as modified.

Mark D. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Randall Einhorn and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was convicted of multiple counts of child sexual abuse. After he was sentenced to an indeterminate life term, the trial court ordered him to pay all “mandatory” financial penalties. As specified in the court minutes and abstract of judgment, those penalties included a \$300 sex offender fine pursuant to Penal Code section 290.3.<sup>1</sup> Appellant contends that fine must be stricken because it was not mandatory, and his attorney was ineffective for failing to challenge it. Respondent argues not only was the fine properly imposed, it should be increased by \$2,500 to reflect the full extent of appellant’s culpability. We think respondent has the better argument. Accordingly, we modify the fine from \$300 to \$2,800. In all other respects, we affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

Appellant sexually abused two girls on multiple occasions starting when they were about five years old. The jury convicted him of four counts of oral copulation (§ 288.7, subd. (b)) and one count each of lewd conduct (§ 288, subd. (a)) and continuous sexual abuse (§ 288.5, subd. (a)).

The probation report did not include any information about appellant’s employment history. However, it did include a statement from one of the victims’ mothers, who said she relied on appellant for financial support.

At the sentencing hearing, the court sentenced appellant to 54 years to life in prison. It also imposed various financial penalties, including a \$3,000 restitution fine and “[a]ll mandatory criminal and court costs and fees[.]” When the court asked defense counsel if she waived recitation of those costs and fees, she said yes.

Following the imposition of those penalties, the court found appellant was unable to pay the cost of the probation report. The court did not say anything about the

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All further statutory references are to the Penal Code.

sex offender fine set forth in section 290.3, but the minute order and abstract of judgment state appellant is required to pay a \$300 fine under that section.

### DISCUSSION

Since the trial court did not expressly impose the \$300 fine, the question presented is whether that fine was encompassed in the court's order respecting all "mandatory" financial penalties. Section 290.3 provides: "Every person who is convicted of [certain sex offenses, including appellant's crimes] shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars (\$300) upon the first conviction or a fine of five hundred dollars (\$500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine." (§ 290.3, subd. (a).)

On its face, section 290.3 makes clear the fines set forth therein are not required. In fact, if the court finds the defendant lacks the ability to pay the fines, it may *not* impose them. (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1370 [statute *requires* trial court to refrain from imposing fines if it determines the defendant does not have the means to pay them].) Therefore, the fines are not mandatory in every case. However, as appellant admits, the defendant has the burden of proving he cannot afford to pay them. (*People v. McMahan* (1992) 3 Cal.App.4th 740, 749-750.) Since appellant offered no evidence in that regard, the fines were required here, and therefore they were encompassed in the trial court's order respecting all "mandatory" financial penalties.

Appellant sees it differently. Although he did not make any attempt to show he lacked the ability to pay the fines set forth in section 290.3, he contends the trial court made an implied finding to that effect when it determined he was unable to pay the cost of the probation report. But any finding regarding the probation report did not occur until after the court had already imposed a \$3,000 restitution fine, which is 10 times the

statutory minimum. (§ 1202.4, subd. (b)(1).) It is unlikely the trial court would have imposed such a hefty restitution fine if it felt appellant was severely impoverished. (See § 1202.4, subd. (d) [in setting restitution fine above the statutory minimum the trial court must consider all relevant factors, including the defendant's ability to pay].) The more likely scenario is that, after ordering appellant to pay the restitution fine and all mandatory penalties, the court felt he could not afford to pay the additional costs associated with preparation of the probation report. We are therefore reluctant to read too much into any implied finding regarding appellant's inability to pay for the report. We do not believe a finding on that issue implies a finding of inability to pay the fines under section 290.3.

As a fallback argument, appellant contends his attorney was ineffective for failing to challenge the section 290.3 fines on the basis he lacked the ability to pay them. When, as here, the record is silent as to why a defense attorney accused of incompetence did not object to a particular ruling in the trial court, a claim of ineffective assistance of counsel should ordinarily be raised in a petition for writ of habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) We will only entertain such a claim on direct appeal if there could be “no conceivable reason” for counsel's inaction. (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.)

One conceivable reason defense counsel might have chosen not to raise the ability-to-pay issue is that she may have known appellant had money. Indeed, the probation report indicates appellant was the primary breadwinner for one of the victim's families. Although defense counsel objected to numerous aspects of the probation report as being inaccurate, she did not contest that particular point, which suggests it had some truth to it. While we cannot be certain about defense counsel's motives, it is entirely possible she had information that would explain why she did not bring up appellant's

finances at sentencing. Therefore, we cannot say on direct appeal that she was ineffective for failing to do so.

That brings us to respondent's claim respecting the amount of appellant's fine under section 290.3. Although the \$300 and \$500 fines provided for in that section are worded in the disjunctive, the statute has been construed to require a \$300 fine on the first count, and a \$500 fine on each subsequent count, when the defendant is convicted of multiple qualifying offenses. (*People v. O'Neal* (2004) 122 Cal.App.4th 817.) Since appellant was convicted of six qualifying offenses, the court's order regarding all "mandatory" financial penalties encompassed a \$300 fine on count one, plus a \$500 fine on each of the other five counts, for a total fine of \$2,800 under section 290.3. We will modify the judgment accordingly.

#### DISPOSITION

Appellant's sex offender fine under section 290.3 is modified from \$300 to \$2,800. The clerk of the trial court is ordered to prepare an amended abstract of judgment reflecting this modification and send a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

GOETHALS, J.